



**1410-72-P**

**LIBRARY OF CONGRESS**

**Copyright Royalty Board**

**37 CFR Part 380**

**[Docket No. 2014-CRB-0001-WR (2016-2020) (Web IV)]**

**Digital Performance Right in Sound Recordings and Ephemeral Recordings**

**AGENCY:** Copyright Royalty Board, Library of Congress.

**ACTION:** Final rule.

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**SUMMARY:** The Copyright Royalty Judges publish final regulations that set the rates and terms for the digital performances of sound recordings by certain noncommercial educational webcasters and for the making of ephemeral recordings necessary to facilitate those transmissions for the period commencing January 1, 2016, and ending on December 31, 2020.

**DATES:** *Effective:* January 1, 2016.

**FOR FURTHER INFORMATION CONTACT:** LaKeshia Keys, Program Specialist, at (202) 707-7658, or at [crb@loc.gov](mailto:crb@loc.gov).

**SUPPLEMENTARY INFORMATION:** The Copyright Royalty Judges (Judges) received a joint motion from SoundExchange, Inc. (SoundExchange), and College Broadcasters, Inc. (CBI) in which they announced a partial settlement of the above proceeding for certain internet transmissions by college radio stations and other noncommercial webcasters.<sup>1</sup> SoundExchange and CBI requested that the Judges adopt their agreement as a partial settlement of rates and terms under Section 112(e) and 114 of the Copyright Act (Act) for eligible nonsubscription

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<sup>1</sup> Joint Motion to Adopt Partial Settlement, Docket No. 2014-CRB-0001-WR (2016-2020) (Oct. 7, 2014) (Joint Motion).

transmissions by noncommercial educational webcasters (NEWs) over the internet, and related ephemeral recordings. The Judges published the proposed settlement and requested comments from the public.<sup>2</sup> For the reasons discussed below, the Judges hereby adopt the proposed settlement, with the exception of a single provision that would identify SoundExchange as the designated Collective for the upcoming license period. The Judges defer designation of the Collective for the upcoming licensing period until the conclusion of the proceeding.

## **Background**

The proposed SoundExchange/CBI settlement (Settlement) generally continues in effect, with certain adjustments, the extant rates for eligible NEWs that were codified in 37 CFR Part 380 Subpart C. The Judges adopted those rates and terms pursuant to Section 801(b)(7)(A) of the Act as part of the prior webcasting determination. *See Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 76 Fed. Reg. 13026 (*Web-III*).

Under the proposed Settlement, an eligible NEW would pay a \$500 annual fee for each of the individual channels, side channels, or stations through which it makes Eligible Transmissions. Proposed Rule 37 CFR 380.22(a). The \$500 fee would also serve as the minimum fee for eligible NEWs. All other NEWs would pay the royalties established under Part 380 Subpart A applicable to noncommercial webcasters. Proposed Rule 37 CFR 380.22(c).

To qualify for the rates under the Settlement, a NEW's total monthly per channel or per station transmissions must remain below 159,140 aggregate tuning hours (ATH). If a NEW's transmissions exceed that threshold, the NEW must pay royalties for the relevant month, and for the remainder of the relevant year, in accordance with the otherwise applicable noncommercial rates to be determined in this proceeding. In subsequent years, a NEW that wishes to pay the

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<sup>2</sup> *See* 79 FR 65609 (Nov. 5, 2014).

rates under the Settlement must take affirmative steps not to exceed the 159,140 ATH threshold. Proposed Rule 37 CFR 380.22(b).

Commercial webcasters are required to make detailed, census reports of all sound recordings they transmit. NEWs with limited listenership may pay the Collective a proxy fee to avoid the burden of census reporting. The Settlement increases the listenership cap (from 55,000 ATH to 80,000 ATH) for services electing the proxy fee *in lieu* of the census reporting option provided in 37 CFR 380.23(g)(1). *See* Proposed Rule 37 CFR 380.22(g)(1).<sup>3</sup> A NEW electing the reporting waiver in 37 CFR 380.23(g)(1) must pay a \$100 annual proxy fee to the Collective. Proposed Rule 37 CFR 380.22(a).

### **Comment Summary**

The Judges received nearly 60 comments—some supporting and some opposing adoption of the Settlement—in response to their request for comments published in the *Federal Register*. Many of the comments appeared to be form letters; hence, the number of commenters exceeded the number of substantive comments. Some of the comments came from affiliated entities. The Judges considered the views of all commenters in reaching their decision and all comments are posted to the CRB’s website. The Judges discuss illustrative examples here.

### **Comments Supporting Adoption of the Settlement**

In its comment supporting adoption of the joint proposal, CBI noted that the Settlement contains

the same terms that NEWs have been successfully using for several years to comply with the statutory license for webcasting copyright works. Keeping these rates and terms in place will prevent disruption of their operation and ensure the

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<sup>3</sup> The Settlement also “makes a handful of further minor changes to the current rates and terms for NEWs.” [SoundExchange’s] Comments Concerning Proposed Settlement at n.1 (Nov. 26, 2014) (SoundExchange Comments).

noncommercial educational webcasters [remain able to provide] creators of musical recordings access to the noncommercial educational listener market.

Comment by College Broadcasters, Inc. in Support of Adopting The Joint Settlement Between College Broadcasters, Inc. and SoundExchange at 1 (Nov. 26, 2014) (CBI Comment).

CBI further noted that

[T]he current Settlement continues essentially the same recordkeeping terms that have been integral for NEWs to be able to comply with the statutory license. In particular, these recordkeeping terms include an optional proxy fee, which allows NEWs to pay an additional \$100 in lieu of complying with ordinarily-applicable recordkeeping rules, which are frequently impossible for NEWs to comply with due to their more limited budgets, older broadcasting technology, and other operational limitations. [T]he new Settlement makes this extremely necessary reporting option available for more stations than the previous one did. It also continues to provide recordkeeping relief for those stations whose audience size makes them ineligible for this proxy option by allowing them to provide recordkeeping data consistent with what is feasible for them to produce. [T]his Settlement also leaves room for webcasters to grow without fear that if they inadvertently grow even the tiniest bit too large they will suddenly incur recordkeeping requirements that are impossible to comply with without first making a significant and unaffordable investment in their station technology and operations.

CBI Comment at 3-4.

WSOU Seton Hall University—not a participant in the proceeding—stated:

Since the current agreement has been in place for several years and has worked to the satisfaction of a large number of college stations, it is prudent to extend that fair and successful arrangement into the future. The proposed settlement is affordable for our station, easily implementable, and relieves WSOU from burdensome reporting requirements while allowing royalties to be paid to the rightful recipients.

WSOU Comment at 1 (Nov. 17, 2014).

Wayne State College—also a nonparticipant—stated:

The proposed agreement...serves our station well. In the past, when reporting requirements were more demanding, it threatened our ability to continue streaming commercially recorded music [because] the station is operated by students, with faculty oversight, and thus has no actual paid employees. The

opportunity to make an additional payment in lieu of reporting makes an overwhelming difference for us.<sup>4</sup>

Wayne State College Comment (Nov. 18, 2014).

### **Comments Opposing Adoption of the Settlement**

Those opposing adoption of the Settlement argue, among other things, that doing so before issuing a final determination in the proceeding would be premature. This position is discussed illustratively in a comment from the Dayton Public School District in Dayton, Ohio (“Dayton”)—not a participant to the proceeding—which contends that “[n]o other commercial or noncommercial agreements have been reached [and] 99.5% of the [SoundExchange] royalty revenue is commercial, 0.5% noncommercial. CBI [represents] only a small fraction of the 0.5% noncommercial. Other rates should be determined before such an insignificant agreement should be considered.” Dayton Public School District Comment (Nov. 26, 2014).

Dayton also claims that the proposed rates in the Settlement are higher than those paid by the Corporation for Public Broadcasting- qualified webcasters and those paid by Live365 in 2009 and 2010. Accordingly, according to Dayton, the CRB “needs to determine all noncommercial ‘willing buyer-willing sellers’ before approving the rate in the CBI/SoundExchange Settlement.” *Id.*

Dayton further contends that the payment of a proxy fee in lieu of reporting requirements precludes accurate allocation of royalties to the artists that earned them.

Lastly, Dayton argues that “[m]any, if not most, of the web streams covered under the CBI agreement would be from public [entities] like public schools, community colleges, and

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<sup>4</sup> See also WRFL–UK Student (Univ. of KY) Radio Comment (Nov. 25, 2014) (the settlement will “allow us to comply with the regulations and provide artists the royalties they deserve while preventing us from having to drastically change our format and recordkeeping methods. Such a change would create a huge cost to us as well as a full overhaul of our training program for students.”); and WRST-FM (Univ. of WI Oshkosh) Comment (Nov. 25, 2014) (“[m]aintaining the current rates and terms for the statutory license for noncommercial stations like us best serves both the educational needs of [our] students and allows us to serve the online listener”).

State colleges/universities.” According to Dayton, “[m]ost State statutes forbid payments from State entities to lobbying organizations. SoundExchange is a lobbying organization...The CRB should de conflict [sic] State and Federal law, perhaps through an aggregator payment like is done through CPB, Live365 and is proposed for IBS Members.” *Id.*<sup>5</sup>

IBS—a participant in the proceeding—“takes no position on whether the [CRB] should approve the rates [set forth in the settlement] for signatories” but, IBS contends, the proposed rates are not reasonable for the majority of educationally based broadcasters and webcasters that do not have paid staffs. According to IBS, CBI’s membership is not representative of a majority of educationally-based broadcasters and webcasters, implying, without offering supporting evidence, that CBI member stations have paid staffs. IBS Comments on SX-CBI’s Joint Rate Proposal at 5 (Nov. 27, 2014). IBS implies, again without offering supporting evidence, that the majority of noncommercial webcasters do not have paid staff, and, therefore, presumably would be less able to pay the rates set forth in the Settlement.<sup>6</sup>

WHRB—a participant in the proceeding—highlights certain “inadvertent drafting anomalies” in the proposal, which, if uncorrected, “might render the proposed rates inapplicable to WHRB’s simulcast stream.” WHRB’s Comments on SX-CBI Rate Proposal at 1 (Nov. 27, 2014) (WHRB Comment). In particular, WHRB notes that the proposed provision addressing the certification requirement would eliminate the word “officer” and substitute “representative of the applicable educational institution.” *Id.* at 1-2. According to WHRB, the existing wording

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<sup>5</sup> Comments substantially identical to those submitted by Dayton were also submitted by RMU Radio Robert Morris University; WCAS Radio Metropolitan State University of Denver; WLMU Le Moyne College Syracuse, NY; XTSR Towson University; and Zumix Radio East Boston, MA. RMU Radio Comment (Dec. 2, 2014), WCAS Radio Comment (Nov. 30, 2014), WLMU Comment (Nov. 26, 2014), XTSR Towson University Comment (Nov. 26, 2014), Zumix Radio Comment (Dec. 1, 2014).

<sup>6</sup> IBS makes an unsubstantiated accusation that SoundExchange indirectly funds—through “CBI convention sponsorship or some such by [SoundExchange]” the salary of CBI’s Executive Director. *Id.* See also Affidavit of Fritz Kass in Support of IBS’ Comments at 2 (Nov. 27, 2014). The Judges place no weight on accusations that are unsupported by credible evidence.

authorizes “student officers of the corporation with personal knowledge of the facts to certify usage.” *Id.* at 2. Yet, none of these student officers “sits as a representative of the President and Fellows of Harvard College.” Although WHRB has a faculty adviser, he is not broadly involved in the operations of the radio station so as to be able to certify under proposed Section 380.23(f)(9). *Id.* at 3. WHRB continues that the Librarian of Congress cannot compel Harvard to appoint such a representative; nor can the station or the Collective. WHRB contends that, as a result, “the Board should not adopt the rules in the form proposed in SX and CBI’s joint petition without correcting the foregoing drafting anomalies.” *Id.* at 5.

### **Other Comments**

The NRBNMLC—a participant in the proceeding—believes that a \$500 flat fee and a complete reporting exemption constitute “workable rates and terms for NEWs.” NRBNMLC Comment at 2 (Nov. 26, 2014). At the same time, however, the NRBNMLC raised certain issues with the proposal. For example, the NRBNMLC noted that the ATH definition

does not unambiguously exclude...programming that does not include sound recordings at all, such as news, talk and sports programming. NEWs receive no benefit under the Statutory Licenses from transmitting such programming, so their transmission of that programming should not adversely affect their fee liability under the Statutory Licenses in any way. Where ATH thresholds are used to affect the fees that NEWs must pay and the reporting requirements that they must follow, discrete programming blocks that do not include sound recordings subject to the Statutory Licenses should not count toward meeting these thresholds.

Comments of the National Religious Broadcasters Noncommercial Music License Committee to the Proposed Rates and Terms for Noncommercial Educational Webcasters Submitted by SoundExchange and CBI at 2 (Nov. 26, 2014) (NRBNMLC Comment). The NRBNMLC “merely points out this flaw in the definition but does not formally object to it.” *Id.* at 3. NRBNMLC states that it “appears that NEWs will not be adversely affected by the ATH definition even if it is construed to include talk and other programming that does not include

recordings in the ATH count” given that “all of them stream at levels below the 159,140 monthly ATH eligibility threshold.” *Id.* at 6-7.<sup>7</sup>

NRBNMLC also notes that not a single NEW paid more than the minimum fee over the past three years, which means that all NEWs streamed at levels below the ATH threshold of 159,140—the threshold for determining whether a station owed fees in excess of the minimum fee for those years. *Id.* NRBNMLC suggests that, as a result, NEWs have no economic incentive to negotiate the 159,140 ATH threshold and 80,000 ATH threshold to the highest level that SoundExchange would accept.<sup>8</sup>

The Corporation for Public Broadcasting (CPB) noted in its comment on behalf of National Public Radio, Inc. (NPR) —a participant in the proceeding—(among others) that: “NPR and Public Radio do not object to the proposed Settlement with the understanding that it does not apply to NPR/Public Radio.” Comments Concerning Proposed Settlement of the Corporation for Public Broadcasting at 1 (Nov. 26, 2014). CPB noted further that NPR/Public Radio “has proposed terms and conditions for SoundExchange’s licensing of NPR/Public Radio that are reasonable and appropriate for NPR/Public Radio; and the proposed Settlement does not and should not have application to same.” *Id.* at 1-2.

### **Analysis and Finding**

The Judges’ authority to adopt proposed settlements as statutory rates and terms is codified in Section 801(b)(7)(A) of the Copyright Act. That provision of the Act authorizes the Judges to adopt as a basis for statutory terms and rates an agreement concerning such matters

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<sup>7</sup> See also WHRB Comment at 4, noting the same issue and indicating that this definition of ATH could result in a “potential overstatement of ATH in Subsections 380.21(c) and (g) and 380.22 with all the attendant consequences.”

<sup>8</sup> The settlement would increase the listenership cap for services electing the proxy reporting option from 55,000 ATH per month to 80,000 ATH per month, with certain conditions. Although not opposing the thresholds in the settlement, NRBNMLC asserts that “[t]here are strong indications that these thresholds actually should be set higher than the proposed levels.” NRBNMLC Comment at 8.



reached among “some or all of the participants” in a proceeding “at any time during the proceeding” except that the Judges must provide an opportunity to comment on the agreement to those that would be bound by the agreement. 17 U.S.C. 801(b)(7)(A)(i).

The Act authorizes the Judges to decline to adopt the agreement for participants that are not parties to the agreement if a participant to the proceeding objects to the agreement and the Judges conclude, based on the record before them if one exists, that the agreement does not provide a reasonable basis for setting statutory terms and rates. 17 U.S.C. 801(b)(7)(A)(ii). Section 801(b)(7)(A) limits the circumstances under which the Judges are able to decline to adopt aspects of an agreement, but it does not foreclose the Judges from ascertaining whether specific provisions are contrary to law. *See Review of Copyright Royalty Judges Determination*, 74 Fed. Reg. 4537, 4540 (Jan. 26, 2009).

In the context of the statutory requirements regarding adoption of settlements, the Judges find that—notwithstanding the objections of some of the commenters—this partial Settlement provides a reasonable basis for setting statutory terms and rates and therefore the Judges adopt the partial Settlement, with one exception discussed below.

Objections to the proposal can be summarized as follows: (1) adopting the Settlement before conclusion of the proceeding would be premature; (2) rates paid by certain other parties in previous agreements are lower than those in the proposed Settlement; (3) payment of a proxy fee *in lieu* of reporting precludes accurate allocation of royalties to artists; (4) colleges and other public entities may not pay royalties to SoundExchange due to applicable state laws prohibiting public entities such as colleges from making payments to lobbying organizations; (5) CBI member organizations are not representative of NEWs because they generally have paid staffs and non-CBI member NEWs generally do not; (6) the proposed ATH definition, which includes

programming other than sound recordings, is too broad; (7) because NEWs' streaming activity is far below the thresholds set in the proposed settlement, they have no incentive to negotiate higher streaming thresholds; and (8) the proposed, amended certification requirement might be unworkable for some NEWs.

The Judges address these concerns in turn.

### **Adopting the Settlement Now Would be Premature**

Section 801(b)(7)(A) of the Act is clear that the Judges have the authority to adopt settlements between some or all of the participants to a proceeding *at any time* during a proceeding so long as those that would be bound by those rates and terms are given an opportunity to comment. Requiring that the adoption of all proposed settlements wait until the conclusion of the proceeding would undercut the policy in Section 801(b)(7)(A) to promote negotiated settlements. Such a position would unnecessarily require those participants that have agreed to a settlement to continue to participate in the proceeding until all interests were resolved. No such requirement is in the Act and the Judges see no reason to impose one.

### **Rates Paid in Previous Agreements are Lower**

Some commenters claim that certain rates agreed to by certain participants in other contexts are lower than those agreed to in the Settlement. Even if true, such a fact would be irrelevant to determining whether the current proposal forms a reasonable basis for rates and terms with respect to the entities to which it applies in the current proceeding. Indeed, in most material respects, the rates and terms of the Settlement merely extend current rates and terms for another five years. The Judges have been presented with no evidence to suggest that the current rates and terms, which the Settlement would extend, have been disruptive or overly burdensome

for the entities to which they apply, notwithstanding that some entities during some previous years may have paid lower rates.

### **Proxy Fee Payment *in Lieu* of Reporting Precludes Accurate Allocation of Royalties**

The Judges are also unconvinced that the provision regarding proxy fee payment *in lieu* of census reporting provides a reason not to adopt the settlement for the upcoming rate period. The extant regulations include this provision. The parties to the agreement have acknowledged that the costs of census reporting may outweigh its benefits to the webcasters covered by the Settlement. The current proposal merely continues a practice that has been in place for the last several years.

Although the threshold to qualify for proxy fee payment *in lieu* of reporting would rise from 55,000 ATH to 80,000 ATH, such an increase would affect few if any qualifying NEWs.<sup>9</sup> Indeed, the higher threshold frees more webcasters from the burdens of census reporting. The proposal also provides additional, reasonable safeguards to ensure that webcasters that do not exceed the threshold in subsequent months will not lose their NEW status (and privileges).

SoundExchange confirms that “the proxy reporting provisions in Section 380.23(g)(1) have proven to be a reasonable solution to the problem of distributing on a fair and cost-effective basis the relatively small pool of royalties paid by NEWs.” SoundExchange Comment at 6. The Judges see no reason to disrupt a reporting method that appears to be operating fairly and efficiently.

### **Public Entity Payments to SoundExchange May Be Prohibited by State Law**

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<sup>9</sup> See SoundExchange Comment at 6 (in 2013, no NEW reported exceeding the 55,000 ATH threshold in any month).

Concerns about state laws as they relate to royalty deposits with SoundExchange as the Collective<sup>10</sup> go to SoundExchange's capacity as the Collective rather than to the merits of the CBI/SoundExchange Settlement. It is worth noting, however, that SoundExchange has served as the Collective since the Judges issued their first webcasting determination and SoundExchange has never been challenged based on its organizational status or activities. Moreover, the Judges are unaware of any instance in which a state or local government has challenged a royalty payment to SoundExchange based on applicable lobbying laws in that state. Therefore, such concerns are speculative at best.

That being said, the Judges decline to adopt at this point the proposed definition of "Collective" in the settlement that expressly designates SoundExchange. Designation of the Collective is an issue that the Judges will decide in the final determination.<sup>11</sup> Therefore, any royalty payments made under the Settlement as adopted, will be paid to the Collective the Judges designate in the final determination.

### **CBI Members Are Not Representative of NEWs Because They Have Paid Staffs**

The Judges find no persuasive evidence in the record before them to support the argument that CBI members are not representative of NEWs generally. Even if the Judges were presented with such evidence, that fact alone would not convince the Judges that the current Settlement is not a reasonable basis for setting rates and terms for those entities that wish to avail themselves of the Settlement. The underlying argument appears to be that NEWs that do not have the resources to pay a staff should be entitled to more favorable terms and rates than those available under the Settlement. Even if that were true—a contention upon which the Judges need

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<sup>10</sup> This opposition to the proposed regulatory provision assumes SoundExchange to be the designated Collective. The Judges' decision assumes, without deciding at this point, that SoundExchange continues in that role.

<sup>11</sup> No party to the proceeding has suggested an alternate or additional Collective.

not opine at this time—that fact would not suggest that the Settlement as proposed does not form a reasonable basis for rates and terms. Proposed settlements need not be the best possible outcome for all concerned; they need only form a reasonable basis for rates and terms, and the Judges find that the current proposal meets that standard.

### **Proposed ATH Definition is Too Broad**

NRBNMLC notes that the definition of ATH in § 380.21, which would carry over under the Settlement, “does not unambiguously exclude...programming that does not include sound recordings at all, such as news, talk and sports programming.” NRBNMLC Comment at 2. Although NRBNMLC does not object to the ATH definition, it believes this aspect of the definition is a “flaw,” albeit not one that would adversely affect NEWs since, according to NRBNMLC, NEWs stream at levels well below the 159,140 ATH level. *Id.* at 6-7.

WHRB also expresses nebulous concern over the ATH definition, noting that it potentially overstates ATH and would have “the attendant consequences.” WHRB Comment at 4. Neither commenter’s concerns about the perceived scope of the ATH definition are of the magnitude that would suggest that the Settlement does not form a reasonable basis for setting rates and terms. Indeed, the Settlement merely carries forward the current ATH definition, which has applied without incident over the current rate period. Therefore, the Judges adopt without change the proposed ATH definition.

### **NEWs Have No Incentive to Adopt Higher Streaming Thresholds**

NRBNMLC notes that during the current license period all NEWs streamed at a level below the 159,140 ATH threshold, and therefore they have no incentive to negotiate a higher threshold for the upcoming license term. The Judges view this statement as an affirmation that the proposed Settlement, which carries forward the current ATH threshold, is a reasonable basis

for rates and terms applicable to NEWs. In reaching that conclusion, however, the Judges do not mean to imply that in other contexts, with respect to entities that stream at levels beyond those that are typical for NEWs, a different streaming threshold might not also be reasonable.

**Proposed Changes to the Certification Requirement Might be Unworkable for Some NEWs**

WHRB takes exception to a provision in the Settlement dealing with the category of persons authorized to certify a NEW's status in statements of account. Currently, the certifying person must be an "officer or other duly authorized faculty member or administrator of the applicable educational institution." 37 CFR 380.23(f)(9). Under the proposal, the certifying person could be any "duly authorized representative" of the applicable educational institution.<sup>12</sup> WHRB contends that the current provision authorizes student officers of WHRB to certify statements of account whereas the proposal would not. The Judges need not opine on whether WHRB's interpretation of the current (or proposed) certification provision is correct.

The Judges find that the proposed change to § 380.23(f)(9), viewed in the context of the proposed Settlement as a whole, is a reasonable means of ensuring that the statement of account is certified by a person who is duly authorized to represent the applicable educational institution for this limited purpose. Nothing in the provision expressly precludes that duly authorized person from being a student, independent auditor, counsel, or other person, so long as the applicable educational institution "duly authorizes" that person to perform the required task as the institution's representative. To be sure, the by-laws of a particular institution may dictate who may or may not serve as a duly authorized representative of a particular educational

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<sup>12</sup> For the sake of consistency, the Judges will also make a corresponding change to 37 C.F.R. 380.23(f)(4) (requiring the signature of the certifying representative).

institution. Nevertheless, the Judges find the proposed amendment to § 380.23(f)(9) to be reasonable in the context of the Settlement as a whole and adopt it unchanged.

### **Impact on Proposed Rulemaking**

On May 2, 2014, the CRB published in the *Federal Register* a Notice of Proposed Rulemaking in which the CRB sought comments on a motion from CBI, IBS, and American Council on Education.<sup>13</sup> In the notice, the Judges announced that the motion—which sought “clarification” of certain amendments to CRB notice and recordkeeping rules in 37 CFR part 370—was not properly before them, thereby effectively denying the motion. Nevertheless, the CRB sought comments on various proposals from the moving parties to expand the categories of entities that could qualify for exclusions from the census reporting requirements of 37 CFR 370.

In response, the CRB received a number of comments from NEWs requesting that the reporting waiver in 37 CFR 380.23(g)(1) (*i.e.*, the provision permitting payment of a proxy fee *in lieu* of census reporting) be extended into the next license term as a viable alternative to amending the CRB’s reporting requirements.<sup>14</sup> Moreover, in its comment, SoundExchange implied that amendment to the CRB reporting requirements for a significant number of affected parties was unnecessary since NEWs with the lowest intensity of usage may elect to pay a proxy fee of \$100 and forego providing reports of use altogether.<sup>15</sup>

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<sup>13</sup> 79 FR 25038. The CRB also sought comments in the notice on a rulemaking petition from SoundExchange that proposed a number of amendments to the CRB’s notice and recordkeeping requirements. That petition is still pending.

<sup>14</sup> *See, e.g.*, the following comments filed in docket number 14-CRB-0005 (RM): ACRN Comment (June 9, 2014), KBCU-FM Comment (May 22, 2014), KBHU-FM Comment (May 19, 2014), KSSU Comment (June 18, 2014), KUIW Comment (June 2, 2014), KWSC-FM Comment (June 23, 2014), KXUL Comment (Aug. 11, 2014), Lasell College Radio Comment (May 22, 2014), SCAD Atlanta Radio Comment (May 22, 2014), WBSU Comment (June 10, 2014), WGSU-FM Comment (June 29, 2014), WJCU Comment (May 21, 2014), Comments of WKNC-FM North Carolina State University (June 9, 2014), WRFL-UK (Univ. of KY) Comment (June 25, 2014), WSDP-FM Comment (June 25, 2014), WSLX Comment (June 19, 2014), and WSOU-FM (Seton Hall University) Comment (May 28, 2014).

<sup>15</sup> SoundExchange Comment at 3. SoundExchange opposed expanding the reporting exclusion to include noncommercial, noneducational webcasters. *Id.* at 4.

Many if not most of the comments responsive to the proposed recordkeeping provisions were filed by NEWs that apparently would qualify under the proposed Settlement to pay the proxy fee *in lieu* of census reporting in the upcoming license period. Extension until December 31, 2020, of the proxy fee *in lieu* of census reporting does not, however, address the precise issue raised in that rulemaking proceeding. The Judges shall address this issue along with a number of other issues relating to Part 370 in a separate publication focused directly on the May 2, 2014, Notice of Proposed Rulemaking.

## **Conclusion**

For the reasons discussed above, the Judges find that the agreement reached voluntarily between SoundExchange and CBI establishes a reasonable basis for setting statutory terms and rates for noncommercial educational webcasters for the period January 1, 2016, through December 31, 2020. The Judges adopt the proposed regulations that codify the partial Settlement with the one exception discussed above, *i.e.*, the reference to SoundExchange as the designated Collective.<sup>16</sup> In adopting the partial Settlement and proposed regulations, the Judges in no way suggest that they are more or less inclined to adopt the reasoning or proposals of any of the parties' remaining in the proceeding.

## **List of Subjects in 37 CFR Part 380**

Copyright, Digital audio transmissions, Performance right, Sound recordings.

## **Proposed Regulations**

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<sup>16</sup> As discussed above, the definition in § 380.21 that the Judges adopt cross-references the *Collective* definition in § 380.2. The Judges also have adopted certain nonsubstantive changes to enhance consistency and accuracy with respect to references in the *Noncommercial Educational Webcaster* definition in § 380.21. In all other respects, the settlement is adopted as proposed.



For the reasons set forth in the preamble, the Copyright Royalty Judges propose to amend 37 CFR part 380 as follows:

**PART 380—RATES AND TERMS FOR CERTAIN ELIGIBLE NONSUBSCRIPTION TRANSMISSIONS, NEW SUBSCRIPTION SERVICES AND THE MAKING OF EPHEMERAL REPRODUCTIONS**

1. The authority citation for part 380 continues to read as follows:

Authority: 17 U.S.C. 112(e), 114(f), 804(b)(3).

2. Amend § 380.20 by revising paragraph (a) to read as follows:

**Subpart C – Noncommercial Educational Webcasters**

**§ 380.20 General.**

(a) *Scope.* This subpart establishes rates and terms, including requirements for royalty payments, recordkeeping and reports of use, for the public performance of sound recordings in certain digital transmissions made by Noncommercial Educational Webcasters as set forth herein in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by Noncommercial Educational Webcasters as set forth herein in accordance with the provisions of 17 U.S.C. 112(e), during the period January 1, 2016, through December 31, 2020.

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3. Amend § 380.21 by revising the definitions for “Collective” and “Noncommercial Educational Webcaster” to read as follows:

**§ 380.21 Definitions.**

\* \* \* \* \*

*Collective* is the collection and distribution organization specified in § 380.2.

\* \* \* \* \*

*Noncommercial Educational Webcaster* means a Noncommercial Webcaster (as defined in 17 U.S.C. 114(f)(5)(E)(i)) that

(1) Has obtained a compulsory license under 17 U.S.C. 112(e) and 114 and the implementing regulations therefor to make Eligible Transmissions and related ephemeral recordings;

(2) Complies with all applicable provisions of Sections 112(e) and 114 and applicable regulations;

(3) Is directly operated by, or is affiliated with and officially sanctioned by, and the digital audio transmission operations of which are staffed substantially by students enrolled at, a domestically accredited primary or secondary school, college, university or other post-secondary degree-granting educational institution;

(4) Is not a “public broadcasting entity” (as defined in 17 U.S.C. 118(f)) qualified to receive funding from the Corporation for Public Broadcasting pursuant to the criteria set forth in 47 U.S.C. 396; and

(5) Takes affirmative steps not to make total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station in any month, if in any previous calendar year it has made total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station in any month.

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4. Revise § 380.22 to read as follows:

**§ 380.22 Royalty fees for the public performance of sound recordings and for ephemeral recordings.**

(a) *Minimum fee for eligible Noncommercial Educational Webcasters.* Each Noncommercial Educational Webcaster that did not exceed 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and does not expect to make total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station in any calendar month during the applicable calendar year shall pay an annual, nonrefundable minimum fee of \$500 (the “Minimum Fee”) for each of its individual channels, including each of its individual side channels, and each of its individual stations, through which (in each case) it makes Eligible Transmissions, for each calendar year it makes Eligible Transmissions subject to this subpart. For clarity, each individual stream (e.g., HD radio side channels, different stations owned by a single licensee) will be treated separately and be subject to a separate minimum. The Minimum Fee shall constitute the annual per channel or per station royalty for all Eligible Transmissions totaling not more than 159,140 Aggregate Tuning Hours in a month on any individual channel or station, and for Ephemeral Recordings to enable such Eligible Transmissions. In addition, a Noncommercial Educational Webcaster electing the reporting waiver described in § 380.23(g)(1), shall pay a \$100 annual fee (the “Proxy Fee”) to the Collective.

(b) *Consequences of unexpectedly exceeding ATH cap.* In the case of a Noncommercial Educational Webcaster eligible to pay royalties under paragraph (a) that unexpectedly makes

total transmissions in excess of 159,140 Aggregate Tuning Hours on any individual channel or station in any calendar month during the applicable calendar year:

(1) The Noncommercial Educational Webcaster shall, for such month and the remainder of the calendar year in which such month occurs, pay royalties in accordance, and otherwise comply, with the provisions of Part 380 Subpart A applicable to noncommercial webcasters;

(2) The Minimum Fee paid by the Noncommercial Educational Webcaster for such calendar year will be credited to the amounts payable under the provisions of Part 380 Subpart A applicable to noncommercial webcasters; and

(3) The Noncommercial Educational Webcaster shall, within 45 days after the end of such month, notify the Collective that it has made total transmissions in excess of 159,140 Aggregate Tuning Hours on a channel or station in a month; pay the Collective any amounts for such month due under the provisions of Part 380 Subpart A applicable to noncommercial webcasters; and provide the Collective a statement of account pursuant to Part 380 Subpart A.

(c) *Royalties for other Noncommercial Educational Webcasters.* A Noncommercial Educational Webcaster that is not eligible to pay royalties under paragraph (a) shall pay royalties in accordance, and otherwise comply, with the provisions of Part 380 Subpart A applicable to noncommercial webcasters.

(d) *Estimation of performances.* In the case of a Noncommercial Educational Webcaster that is required to pay royalties under paragraph (b) or (c) on a per-performance basis, that is unable to calculate actual total performances, and that is not required to report actual total performances under § 380.23(g)(3), the Noncommercial Educational Webcaster may pay its applicable royalties on an ATH basis, provided that the Noncommercial Educational Webcaster

shall pay such royalties at the applicable per-performance rates based on the assumption that the number of sound recordings performed is 12 per hour. The Collective may distribute royalties paid on the basis of ATH hereunder in accordance with its generally applicable methodology for distributing royalties paid on such basis. In addition, and for the avoidance of doubt, a Noncommercial Educational Webcaster offering more than one channel or station shall pay per-performance royalties on a per-channel or -station basis.

(e) *Ephemeral royalty*. The royalty payable under 17 U.S.C. 112(e) for any ephemeral reproductions made by a Noncommercial Educational Webcaster is deemed to be included within the royalty payments set forth in paragraphs (a) through (c) of this section and to equal 5% of the total royalties payable under such paragraphs.

5. Amend § 380.23 by:

- a. Revising paragraph (c);
- b. Removing and reserving paragraph (d);
- c. Revising paragraph (f) introductory text;
- d. Removing and reserving paragraph (f)(2); and
- e. Revising paragraphs (f)(4), (f)(9), (g)(1), and (g)(3).

The revisions read as follows:

**§ 380.23 Terms for making payment of royalty fees and statements of account.**

\* \* \* \* \*

(c) *Minimum fee.* Noncommercial Educational Webcasters shall submit the Minimum Fee, and Proxy Fee if applicable, accompanied by a statement of account, by January 31<sup>st</sup> of each calendar year, except that payment of the Minimum Fee, and Proxy Fee if applicable, by a Noncommercial Educational Webcaster that was not making Eligible Transmissions or Ephemeral Recordings pursuant to the licenses in 17 U.S.C. 114 and/or 17 U.S.C. 112(e) as of said date but begins doing so thereafter shall be due by the 45<sup>th</sup> day after the end of the month in which the Noncommercial Educational Webcaster commences doing so. At the same time the Noncommercial Educational Webcaster must identify all its stations making Eligible Transmissions and identify which of the reporting options set forth in paragraph (g) of this section it elects for the relevant year (provided that it must be eligible for the option it elects).

\* \* \* \* \*

(f) *Statements of account.* Any payment due under § 380.22(a) shall be accompanied by a corresponding statement of account on a form provided by the Collective. A statement of account shall contain the following information:

\* \* \* \* \*

(4) The signature of a duly authorized representative of the applicable educational institution;

\* \* \* \* \*

(9) A statement to the following effect:

I, the undersigned duly authorized representative of the applicable educational institution, have examined this statement of account; hereby state that it is true, accurate, and complete to my knowledge

after reasonable due diligence; and further certify that the licensee entity named herein qualifies as a Noncommercial Educational Webcaster for the relevant year, and did not exceed 159,140 total ATH in any month of the prior year for which the Noncommercial Educational Webcaster did not submit a statement of account and pay any required additional royalties.

(g)\* \* \*

(1) *Reporting waiver.* In light of the unique business and operational circumstances with respect to Noncommercial Educational Webcasters, and for the purposes of this subpart only, a Noncommercial Educational Webcaster that did not exceed 80,000 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year and that does not expect to exceed 80,000 total ATH for any individual channel or station for any calendar month during the applicable calendar year may elect to pay to the Collective a nonrefundable, annual Proxy Fee of \$100 in lieu of providing reports of use for the calendar year pursuant to the regulations § 370.4 of this chapter. In addition, a Noncommercial Educational Webcaster that unexpectedly exceeded 80,000 total ATH on one or more channels or stations for more than one month during the immediately preceding calendar year may elect to pay the Proxy Fee and receive the reporting waiver described in paragraph (g)(1) of this section during a calendar year, if it implements measures reasonably calculated to ensure that it will not make Eligible Transmissions exceeding 80,000 total ATH during any month of that calendar year. The Proxy Fee is intended to defray the Collective's costs associated with this reporting waiver, including development of proxy usage data. The Proxy Fee shall be paid by the date specified in paragraph (c) of this section for paying the Minimum Fee for the applicable calendar year and shall be accompanied by a certification on a form provided by the Collective, signed by a duly

authorized representative of the applicable educational institution, stating that the Noncommercial Educational Webcaster is eligible for the Proxy Fee option because of its past and expected future usage and, if applicable, has implemented measures to ensure that it will not make excess Eligible Transmissions in the future.

\* \* \* \* \*

(3) *Census-basis reports.* If any of the following three conditions is satisfied, a Noncommercial Educational Webcaster must report pursuant to paragraph (g)(3) of this section:

(i) The Noncommercial Educational Webcaster exceeded 159,140 total ATH for any individual channel or station for more than one calendar month in the immediately preceding calendar year;

(ii) The Noncommercial Educational Webcaster expects to exceed 159,140 total ATH for any individual channel or station for any calendar month in the applicable calendar year; or

(iii) The Noncommercial Educational Webcaster otherwise does not elect to be subject to paragraph (g)(1) or (2) of this section.

A Noncommercial Educational Webcaster required to report pursuant to paragraph (g)(3) of this section shall provide reports of use to the Collective quarterly on a census reporting basis in accordance with § 370.4 of this chapter, except that, notwithstanding § 370.4(d)(2), such a Noncommercial Educational Webcaster shall not be required to include ATH or actual total performances, and may in lieu thereof provide channel or station name and play frequency, during the first calendar year it reports in accordance with paragraph (g)(3) of this section. For the avoidance of doubt, after a Noncommercial Educational Webcaster has been required to



report in accordance with paragraph (g)(3) of this section for a full calendar year, it must thereafter include ATH or actual total performances in its reports of use. All reports of use under paragraph (g)(3) of this section shall be submitted to the Collective no later than the 45<sup>th</sup> day after the end of each calendar quarter.

\* \* \* \* \*

Dated: August 3, 2015

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Jesse M. Feder  
Copyright Royalty Judge

Approved by:

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James H. Billington,  
Librarian of Congress.

[FR Doc. 2015-24506 Filed: 9/25/2015 08:45 am; Publication Date: 9/28/2015]